BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE R. FLOOD		
Claimant	)	
VS.	)	
	)	Docket No. 1,051,282
	)	
NCR CORPORATION	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the June 16, 2011, Order for Production of Records entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Director appointed E. L. Lee Kinch of Wichita, Kansas, to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 31, 2011, preliminary hearing and exhibits, the transcript of the June 9, 2011, preliminary hearing and exhibits, together with the pleadings contained in the administrative file.

ISSUES

At a June 9, 2011, preliminary hearing, respondent's counsel requested the ALJ to direct claimant's counsel to sign an order for production of records prepared by respondent's counsel. Claimant's counsel objected to the order for production. On

June 16, 2011, ALJ Barnes entered an Order for Production of Records (Order). Claimant contends the Order should be limited to reasonable discovery. Claimant argues the Order is overly broad as there is no time limitation; the Order allows respondent to obtain information from all State agencies which could include records having no relevance to this proceeding and would severely invade the claimant's privacy; and the Order is vague and ambiguous. In his brief, claimant's attorney states:

> It is Claimant's contention that this Order for Production of Records could be interpreted as one that allows Respondent to obtain documentation on the claimant from non-medical sources without limitation. It is of great concern to the claimant that even though he has filed a workers compensation claim acknowledging a limited waiver of his right to privacy with respect to his medical care, he did not waive his right to the production of other types of State records as this Order for Production allows. . . . Lastly, Claimant contends that this and any other Order for Production of medical record should provide for the protection of claimant's rights as it pertains to those medical records. Again, claimant will concede that he gave up the right to have a complete doctor-patient privilege by filing this worker's compensation claim. However, it is claimant's contention that this Order should limit the availability and/or use of these medical records to this legal case or claim and that this Order should direct any recipient of medical records pertaining to claimant to be limited in how they use these medical records such that they will not be redistributed, used, or shared outside of the law firm requesting these records except in a legal proceeding and that at the end of this case these records will be gathered, secured, or destroyed.[1]

Claimant requests the Board modify the Order.

The ALJ also issued an Order on June 9, 2011, wherein she determined claimant reached medical maximum improvement (MMI). In his brief, respondent's attorney argues claimant has reached maximum medical improvement and asks the Board to affirm the ALJ's determination. None of the parties appealed the June 9, 2011, preliminary hearing Order within 10 days of its issuance, as required by K.S.A. 2010 Supp. 44-551(i)(1). Accordingly, the Board does not have jurisdiction to review any issue stemming from the June 9, 2011, preliminary hearing Order, and that Order remains in full effect.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to hear this appeal? Respondent alleges the Board lacks subject matter jurisdiction over this appeal. Claimant asserts the Order is final and, thus, appealable.

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[1] Claimant's Brief at 4 (filed July 21, 2011).

2. If so, is the June 16, 2011, Order for Production of Records overly broad and burdensome?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

Two preliminary hearings were held in this claim. At the March 31, 2011, preliminary hearing, neither the parties nor the ALJ addressed the issue of production of records. A brief discussion concerning production of records took place at the June 9, 2011, preliminary hearing:

> Mr. Hobbs: First off, Your Honor, I would like to point out that this is a January 14, 2010 date of accident. To date, the claimant's attorney has refused to sign our order for production of records, hampering us in the defense of this case. I would request the Court direct claimant attorney at this time to sign our order for production of records. This has been going on for over a year now, so we can at least have an order for production of records that is pursuant to statute and pursuant to administrative regulations.
>
> The Court: Well, in the past, when the claimant has refused to sign, you guys have just given it to me anyway and I reviewed it and either signed it or not signed it and told you you needed a hearing or didn't need a hearing.
>
> Mr. Hobbs: All right, here's my order, Your Honor.
>
> Mr. Riedmiller: This is a complete surprise to me. Doug [Hobbs] didn't mention that anytime out in the hallway or in the conference room while we were waiting for the two and a half hours before, otherwise I would have made a phone call to try to find out why the order wasn't signed or if the order was signed and just it fell between the cracks or what happened.
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> Mr. Hobbs: I think it's ridiculous, Your Honor, that here we are in June of 2011 for a January, 2010 date of accident.
>
> The Court: Well, getting an order for production of records signed is not a matter that goes to hearing unless I refuse to sign it, because it's not signed by both, and tell you you need a hearing on it, so unless I say that, you don't have to have a hearing on it, you just send it to me. You didn't sign it either though.
>
> Mr. Hobbs: I always sign it before -- I'll be happy to sign it now, I always sign it last, before we send it on, but I'll be happy to sign it now, Your Honor, and get that going, that would certainly help us in the defense of this case.

> Mr. Riedmiller: I would like to state my objection on the record with respect to the order for production, but I haven't even seen the order that he's asking you to sign.
>
> Mr. Hobbs: That's not right, Roger [Riedmiller], I've sent several copies to you, it's the standard order we send to everybody, and claimant attorney has across the board refused --
>
> The Court: Let's go off the record.
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> (Off-the-record discussion)[2]

No further discussion of the order for production of records is contained in the June 9, 2011, preliminary hearing transcript. On June 10, 2011, claimant sent a letter to the ALJ presenting objections to the order for production prepared by respondent's counsel. The ALJ received a response letter from respondent on June 14, 2011. The ALJ entered an Order for Production of Records on June 16, 2011. From the aforementioned letters, the Board assumes the parties agreed claimant's counsel would submit his objections to the order for production, followed by a response from respondent's counsel. In his letter to the ALJ, the application for review and his brief to the Board, claimant's attorney did not raise lack of due process as an issue.

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) states:

> Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject

[2] P.H. Trans. (June 9, 2011) at 8-10.

> to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2010 Supp. 44-551(i)(2)(A) states:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

In *Rhodeman*,[3] the Board addressed the issue of whether an appeal from an order for production of records is appealable. In that case the claimant disputed that portion of the order that required disclosure of vocational rehabilitation and employment records. The Board stated:

> Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. But the Court of Appeals has also recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The Court states three criteria which also make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgement. *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

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[3] *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

In our view, the current Order satisfies these three criteria. The Order conclusively determines whether respondent is entitled to have production of the records in question. The Order is completely separate from the merits of the action and is effectively unreviewable on appeal after the documents have been produced. The Court of Appeals has held that sanctions for failure to comply with discovery does not satisfy these three criteria because an order for sanctions is subject to effective review on appeal. *Reed v. Hess*, 239 Kan. 46, 716 P.2d 555 (1986). In fact, most orders can be effectively reviewed. Orders such as that in the *Winters* case, an order for appointment of a neutral physician, decisions regarding terminal dates, admission of evidence, and most other orders can be effectively reviewed in the sense that there remains a remedy. In this case, however, the interest involved is the interest in protecting confidential information not relating to the workers compensation proceeding. Claimant uses, as an example, information relating to one's children used to justify leave under the Family Leave Act. There could be numerous other examples. But once the information is disclosed, there is no remedy. The Kansas Court of Appeals borrowed this definition of final orders from the federal courts. The federal courts have generally not permitted appeal from discovery orders and have instead insisted the parties force the issue to sanctions or contempt charges which can then be reviewed in a later appeal. *Connaught Lab., Inc. v. SmithKline Beecham P.L.C.*,165 F.3d 1368, 49 U.S.P.Q.2d 1540 (Fed. Cir. 1999). But the workers compensation system does not have the same contempt and sanction options. Appeal of the order itself is the only effective option. The decision should, therefore, be considered final and subject to review.

As to the merits, claimant does not, as indicated, dispute the portion of the Order relating to medical records and the Board will not address that portion of the Order. The only issue is related to production of employment records. The Act gives the Director and the Board the power to compel the production of documents and records to the same extent as is conferred on district court of this state under the code of civil procedure. K.S.A. 44-549. The Board agrees that the Order for production of vocational rehabilitation and employment records in this case is too broad. It can reasonably be read to include any employment record. Respondent is entitled to discover information necessary to ascertain what tasks claimant performed in the 15 years before the accident. K.S.A. 44-510e. Respondent is also entitled to information the employers or vocational rehabilitation counselors might have about related injuries as well as the skills claimant may have to apply if new employment becomes necessary. And, depending on the issues in the case, respondent may be entitled to various other types of information from previous employers and vocational rehabilitation counselors. But the respondent is not entitled to each and every document from claimant's prior employment without limitation on the period or the types of documents to be disclosed. The Order can be reasonably narrowed and at the same time protect the interests of both parties. The Board, therefore, concludes that portion of the Order relating to vocational rehabilitation and employment records should be declared void.[4]

[4] *Id.*

In *Russell*,[5] the ALJ ordered the respondent to produce surveillance materials before it deposed the claimant. The respondent appealed. The claimant asserted the Board had no jurisdiction to review the order, because it was interlocutory. The Board, citing *Rhodeman*, held the order was final and, thus, appealable.

ANALYSIS

After reviewing the administrative file, the Board determines the parties agreed that claimant would submit written objections concerning the order for production to the ALJ. Respondent would be given time to file a response, followed by a ruling by the ALJ on the propriety of the order.

The June 16, 2011, Order for Production of Records is a final order if one applies the three criteria set out in *Rhodeman*. The Order conclusively determines whether records must be produced and is separate from the merits of the claim. This situation is akin to Pandora's box. Once the records claimant objects to have been produced, an appeal will provide claimant little relief.

K.S.A. 2010 Supp. 44-551 allows the Board to review all final orders. In *King*,[6] *Rhodeman* and *Russell*, the Board determined it has jurisdiction to review an order to produce records. The June 16, 2011, Order is final in nature and, therefore, may be reviewed by the Board.

Claimant objects to the June 16, 2011, Order for three reasons. First, claimant alleges there is no limitation on the time the Order is effective. Claimant argues the Order allows inspection of his records *ad infinitum*. The only time parameter is that the Order is effective through the pendency of this action. The language of the Order could permit claimant's employment records more than 15 years prior to the accident to be disclosed. After an Award is entered, respondent could continue to request, and receive, claimant's records.

Claimant's second objection is that the Order is overly broad and allows respondent to obtain any and all information concerning claimant from state agencies, not merely employers and health care providers. Claimant asserts that respondent could obtain records from third parties that bear no relevance to the claim. He contends the Order permits respondent to obtain ". . . all records, bills, statements, reports, accounts, including

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[5] *Russell v. Bank of America, NA*, No. 1,012,015, 2004 WL 1810318 (Kan. WCAB July 30, 2004).

[6] *King v. Manpower Temporary Services*, No. 270,185, 2002 WL 31103977 (Kan. WCAB Aug. 30, 2002).

any records involving drug or alcohol abuse, and all other papers, instruments and documents of any type of nature within their care, custody and/or control . . . ."[7]

Records from the State of Kansas contain information concerning citizens from life until death. Much of that information is sensitive and private. The Order could allow respondent to obtain from the State of Kansas, employers and various medical providers literally any records in their possession concerning claimant. Respondent could obtain information such as an estate tax return filed by claimant, claimant's marriage license, or birth certificate, all of which are likely irrelevant to the claim. Simply put, the Order is overly broad.

Claimant's third objection to the Order for Production of Records is that it is vague and ambiguous. The Board concurs. The Order is vague and ambiguous and can be interpreted several ways. One can interpret the Order to mean that only records concerning claimant's health, evaluation or medical treatment must be produced, except records excluded in 42 C.F.R. 2.1 et. seq.

Interpreted another way, all employers, hospitals, doctors, medical facilities, medical practitioners, pharmacies, clinics and state agencies must produce all papers, instruments and documents of any type or nature within their control concerning claimant, except those records excluded in 42 C.F.R. 2.1 et. seq. If a medical provider or agency interprets the Order in this latter fashion, personal information that is irrelevant to the claim may be disclosed. If that were to happen, the damage to claimant could be irreparable. Therefore, as routine and mundane as orders for production of records may be, they must be carefully crafted, so as not to be overly broad or ambiguous.[8]

CONCLUSION

1. The Board has jurisdiction to review the June 16, 2011, Order for Production of Records.

2. The Order for Production of Records is overly broad and is ambiguous. Further, the time parameters of the Order are not sufficiently defined.

WHEREFORE, the Board reverses and remands for modification the June 16, 2011, Order for Production of Records entered by ALJ Barnes, consistent with this Order, pursuant to K.S.A. 2010 Supp. 44-551.

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[7] ALJ Order for Production of Records (June 16, 2011) at 1.

[8] The Board would note that a standard order for production of records consistent with this Order, developed by the ALJ or the Division of Workers Compensation, would assist greatly in avoiding appeals of this nature.

IT IS SO ORDERED.

Dated this ____ day of September, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge